

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

|   |   |                     |
|---|---|---------------------|
| Inquiry Concerning the Deployment of        | ) |                     |
| Advanced Telecommunications                 | ) |                     |
| Capability to All Americans in a Reasonable | ) |                     |
| And Timely Fashion, and Possible Steps      | ) | GN Docket No. 04-54 |
| To Accelerate Such Deployment Pursuant      | ) |                     |
| To Section 706 of the Telecommunications    | ) |                     |
| Act of 1996                                 | ) |                     |

**COMMENTS OF AT&T CORP.**

AT&T Corp. (“AT&T”) hereby submits these comments in response to the Commission’s *Notice of Inquiry* into the issue of advanced telecommunications deployment.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

The *Notice of Inquiry* begins the Commission’s fourth inquiry under Section 706 of the Telecommunications Act of 1996 into the issue of whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. In Section 706 of the Act, Congress directed the Commission and the states to encourage the deployment of advanced telecommunications capability to all Americans,<sup>2</sup> and instructed the Commission to conduct regular inquiries concerning the availability of advanced telecommunications capability.

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<sup>1</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Notice of Inquiry*, GN Docket No. 04-54, FCC 04-55 (rel. March 17, 2004) (“*Notice of Inquiry*”).

<sup>2</sup> See Section 706(b) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (the “Act”) reproduced at 47 U.S.C. Section 157.

As the Commission observed in the *Notice of Inquiry*, advanced services already play, and will continue to play a vital role in the nation's economy and the life of its people.<sup>3</sup>

The comments filed in response to the *Third NOI* in CC Docket No. 98-146<sup>4</sup> confirmed that as of October 2001, the deployment of advanced telecommunications capability was occurring on a reasonable and timely basis. In 2001, cable, digital subscriber line (“DSL”), satellite, fixed wireless and public utilities—the technologies that the FCC had focused upon in its previous reports—continued to provide service to the vast majority of high-speed service subscribers. While the incumbent carriers agreed that deployment had been reasonable and timely, they nevertheless attempted to argue that the market-opening requirements of the 1996 Act were impeding their ability to compete with cable operators for high-speed customers. The evidence of vigorous broadband deployment submitted in Docket 98-146—including evidence offered by the ILECs themselves—belied any claim that regulatory change was necessary.

In the *Notice of Inquiry*, the Commission once again asks if advanced telecommunications capability is being deployed to all Americans, and whether the current level of deployment is reasonable and timely.<sup>5</sup> Since 2001, the broadband marketplace has experienced fundamental change: satellite, fixed wireless and public utilities have virtually dropped out of sight, having failed to become viable alternatives to cable or to DSL. Today, the competitive field has narrowed to two major players—cable and DSL.

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<sup>3</sup> *Notice of Inquiry*, para. 2. (“Congress recognized that the availability of infrastructure capable of transmitting broadband or advanced services was critical to the future of our nation. [footnote omitted] Advanced services already play a vital role, and will continue to do so throughout the 21<sup>st</sup> century, in the nation's economy and the life of its people.”)

<sup>4</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Notice of Inquiry*, 16 FCC Rcd 15,815 (rel. Aug. 10, 2001) (“*Third NOI*”).

<sup>5</sup> *Notice of Inquiry*, para 10.

Currently, the broadband marketplace is at best a duopoly of cable modem service and ILEC-provided DSL service, with DSL approaching and attaining parity with cable modem services. In November 2003, SBC's chairman stated that SBC's DSL service had in fact achieved parity with cable modem services, telling analysts "while we are clearly the largest DSL provider, we believe that within our footprint, we are at parity with cable modem."<sup>6</sup> According to a recent report by Goldman Sachs, once such parity is reached, the Regional Bell Operating Companies ("RBOCs") and the cable companies will settle into a 50/50 duopoly in which each side will recognize the benefits of an industry equilibrium, and both sides will seek to avoid the negative implications of trying to increase their market share.<sup>7</sup> The lack of a multi-provider broadband marketplace has had, and will continue to have, a harmful effect on the broadband marketplace. As Chairman Powell has observed, limitation of competition to a duopoly "would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers."<sup>8</sup>

In pleadings filed in the *Triennial Review* and other dockets, the RBOCs have continued to claim that additional regulatory relief is needed to spur their deployment of broadband services. These arguments confuse and conflate the *availability* of broadband services with the *demand* for those services. The *availability* of cable and DSL services has been widespread, and has continued to grow at a brisk pace. Currently, DSL services are available to approximately 75-80% of the RBOCs' customers. Any lack of subscribership claimed by the RBOCs is a

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<sup>6</sup> Statement of Chairman Ed Whitacre, SBC Communications Analyst Meeting, Fair Disclosure Wire, CCBN and FDCH e-Media, November 13, 2003 (Transcript, p. 6) ("Whitacre Statement").

<sup>7</sup> Goldman Sachs, *Telecom Services: Wireline//Broadband* (April 16, 2004) at 7; *Telecom Services: DSL Broadband Share Just Over 50% This Qtr; Ideal Situation* (Apr. 29, 2004) at 1.

<sup>8</sup> *Application of EchoStar Communications Corp., et al.*, Hearing Designation Order, 17 FCC Rcd 20,559, Statement of Chairman Powell (rel. Oct. 18, 2002) ("Powell Statement").

result, not of the lack of *availability*, but of the less than robust *demand* for their service offerings, which is a matter of the willingness of customers to adopt the RBOC's services. Nor has the demand for RBOC services been hampered by regulatory uncertainty, as the RBOCs continue to claim. Arguments that broadband deployment has been slowed by uncertainty regarding the RBOCs' unbundling requirements have been put to rest by the *Triennial Review Order*. The RBOCs received all the regulatory relief they requested—and substantially more than they require—in the *Triennial Review Order*. In these circumstances, the additional relief sought by the RBOCs is unnecessary and unwarranted.

As the Commission recognizes in the *Notice of Inquiry*, the emergence of advanced services that were unheard of only a few years ago makes it clear that “monitoring the progress and deployment of advanced telecommunications platforms and determining if steps can or should be taken to further encourage this growth is one of the Commission’s most important duties.”<sup>9</sup> To avoid the adverse consequences of an entrenched duopoly, the Commission should spur the growth and development of broadband applications such as Voice Over Internet Protocol (“VoIP”) that drive the deployment of advanced services. In addition to serving as a major driver of incremental broadband growth, VoIP holds the potential to “reduce the cost of communication and spur innovation and individualization on a previously unthinkable scale.”<sup>10</sup> The Commission should also encourage the deployment of alternative broadband technologies, such as access broadband over power line systems (“BPL”) and wireless fidelity services (“WiFi”), that have the potential to emerge as robust competitors to the broadband duopoly.

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<sup>9</sup> *Notice of Inquiry*, para. 5.

<sup>10</sup> *Id.* (“For example, companies are developing services and applications making use of Internet Protocol (IP), including Voice Over Internet Protocol (VoIP), which are delivered over broadband connections. This new communications environment could provide each customer with a highly customized, low-cost choice of services delivered in the manner of his or her choosing.”)

**I. THE ADVANCED TELECOMMUNICATIONS MARKET HAS EVOLVED INTO A DUOPOLY OF CABLE AND DSL SERVICES.**

In CC Docket 98-146, most commenters agreed that deployment of advanced telecommunications capability had been reasonable and timely. The record showed a dramatic growth in the number of broadband subscribers as evidence of such deployment.<sup>11</sup> For example, as Sprint noted, the number of high-speed lines in service had increased 158 percent during 2000 alone.<sup>12</sup> The record further showed that deployment was taking place in rural areas as well as in more densely populated areas.<sup>13</sup> In 2001, cable, DSL, satellite, fixed wireless and public utilities—the technologies that the FCC had focused upon in its previous reports—provided service to the vast majority of high-speed service subscribers.

In recent years, the competitive landscape has changed dramatically. Since 2001, satellite, fixed wireless and public utilities have failed to become viable alternatives to cable or DSL. Today, the field has narrowed to two major players—cable and DSL. One additional broadband application—VoIP—has entered the advanced services arena, despite attempts by the RBOCs to hinder VoIP deployment by tying DSL to the Bells’ voice services. Two alternative broadband technologies—BPL and WiFi—have also emerged, and hold the potential to provide robust competition to cable and DSL as well.

AT&T will discuss the implications for each of these broadband services, applications and technologies in turn.

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<sup>11</sup> Comments of National Cable & Telecommunications Association at 4, 11-15.

<sup>12</sup> Comments of Sprint at 3-4.

<sup>13</sup> *See, e.g.*, Comments of BellSouth Corporation (“BellSouth”) at 5. As the Organization for the Protection and Advancement of Small Telecommunications Companies (“OPASTCO”) noted (at 3), many small providers of advanced and high-speed services in rural areas are not required to file Form 477, so the full extent of rural deployment was not known.

**A. The Availability of High-Speed Cable Modem Facilities Has Continued to Increase.**

As of the end of the third quarter 2003, there were more than 15 million subscribers to high-speed cable modem services in the United States, up from 5.5 million in 2001.<sup>14</sup> Whereas in 2001, cable modem service was available to approximately 60 million homes in the United States, or approximately 62 percent of all cable homes passed, as of the end of the third quarter 2003, cable modem service was available to approximately 90 million U.S. homes, or approximately 85 percent of all cable homes passed.<sup>15</sup> Over the last five years, cable operators have spent over \$72 billion, including \$16 billion in 2001 alone, upgrading their facilities to make new services available to their customers.

**B. DSL Services Are Achieving Parity With High-Speed Cable Modem Facilities.**

Overall, the current RBOC DSL coverage is estimated to be approximately 75-80% of total RBOC lines.<sup>16</sup> Verizon ended the fourth quarter of 2003 with more than 2.3 million DSL customers (up from 720,000 DSL lines in service in 2001), and DSL availability on 44.7 million of its 55.54 million (80%) access lines.<sup>17</sup> Verizon's DSL customer base has exhibited a growth of approximately 40 percent since the fourth quarter of 2002.<sup>18</sup> SBC ended the fourth quarter of

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<sup>14</sup> National Cable and Telecommunications Association Industry Statistics, visited Sept. 21, 2001 (2001 statistics). [http://www.ncta.com/industry\\_overview/indStat.cfm?indOverviewID=2](http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2); 2003 Year-End Industry Overview, National Cable and Telecommunications Association at 8, visited May 8, 2004 [http://www.ncta.com/pdf\\_files/Overview.pdf](http://www.ncta.com/pdf_files/Overview.pdf). (2003 statistics)

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *DSL-A Reversal of Fortune*, Deutsche Bank at 5, May 3, 2004.

<sup>17</sup> *Verizon Deploys Fiber Optics, Network Systems To Expand, Improve Service in Capital District*, Verizon news release (June 4, 2001) <<http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=55628> (2001 statistics); *Verizon DSL Growth Continues Acceleration*, Broadband Daily, January 30, 2004 (2003 statistics).

<sup>18</sup> *Id.*

2003 with more than 3.5 million DSL customers (up from 954,000 DSL customers in 2001), and DSL availability on 36.4 million of its 54.7 million (75%) access lines.<sup>19</sup> SBC's customer base exhibited a growth of approximately 60 percent since the fourth quarter of 2002.<sup>20</sup>

Qwest ended the fourth quarter of 2003 with 637,000 DSL customers (up from 360,000 DSL customers in 2001), and DSL availability on 10.5 million of its 16.1 million (53%) access lines.<sup>21</sup> Qwest's customer base has exhibited a growth of approximately 25 percent since the fourth quarter of 2002.<sup>22</sup> BellSouth ended the fourth quarter of 2003 with 1.46 million DSL customers (up from 303,000 DSL customers in 2001) and DSL availability on 17.44 million of its 23.7 million (74%) access lines.<sup>23</sup> BellSouth's customer base exhibited growth of approximately 43 percent since the fourth quarter of 2002.<sup>24</sup>

Several independent studies confirm the conclusion that cable and DSL services are moving toward parity. According to a recent report by Goldman Sachs, DSL is expected to be at parity with cable modem service with respect to new broadband subscribers by the end of this year.<sup>25</sup> The following statement, delivered by Ed Whitacre of SBC in a recent SBC

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<sup>19</sup> Richard Williamson, *Broadband Still Blooming*, Interactive Week (May 8, 2001) <http://www.zdnet.com/zdnn/stories/news/o,4586,2716241,00.html> (2001 statistics); *SBC Weakened in Q4 Despite DSL, LD Gains*, Broadband Daily, January 28, 2004 (2003 statistics).

<sup>20</sup> *Id.*

<sup>21</sup> *Qwest Communications Reports Strong Second Quarter 2001 Results Driven By Growth In Commercial, Internet And Data Revenue*, Qwest news release (July 24, 2001) <[http://www.qwest.com/about/media/pressroom/1,1720,713\\_archive,00.html](http://www.qwest.com/about/media/pressroom/1,1720,713_archive,00.html)> (2001 statistics); *Qwest Swings to Loss as DSL Climbs*, Broadband Daily, February 20, 2004 (2003 statistics).

<sup>22</sup> *Id.*

<sup>23</sup> *BellSouth Reports First Quarter Earnings*, BellSouth news release (April 19, 2001) <<http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=35863>>.

<sup>24</sup> *Id.*

<sup>25</sup> Goldman Sachs, *Telecom Services: Wireline/Broadband* (Apr. 16, 2004) at 7.

Communications analyst meeting, indicates that SBC's DSL services have already attained parity with cable modem services:

"Another key position for SBC is to become the broadband leader. As you know, we've put a lot of emphasis on becoming the country's broadband leader. And while we are clearly the largest DSL provider, we believe that within our footprint, we are at parity [sic] with cable modem. Our numbers tell the story. We've had seven consecutive quarters of accelerated growth resulting in 10% penetration of locations passed (ph) overall, and California is at 13% penetration. And we're continuing to increase availability, moving to 80% of homes and businesses broadband capable by the first quarter of 2004."<sup>26</sup>

Deutsche Bank reports that DSL will have the lead in net additions to the subscriber base once the results of the first quarter 2004 are tabulated.<sup>27</sup>

**C. The Duopoly of Cable Modem and DSL Services Will Impede Broadband Deployment Unless Other Broadband Applications Are Encouraged to Emerge.**

Today's broadband marketplace is at best a duopoly of cable modem service and ILEC-provided DSL service. Indeed, many Americans do not have even that choice of broadband providers. The lack of a multi-provider broadband marketplace has had, and will continue to have, a harmful effect on residential and small business customers. As Chairman Powell has observed, limitation of competition to a duopoly will "decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers."<sup>28</sup>

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<sup>26</sup> Statement of Chairman Ed Whitacre, SBC Communications Analyst Meeting, Fair Disclosure Wire, CCBN and FDCH e-Media, November 13, 2003 (Transcript at 6).

<sup>27</sup> *DSL-A Reversal of Fortune*, Deutsche Bank, p. 1, May 3, 2004 ("We estimate a record 2.3mn broadband net adds, with 1.17mn from DSL edging out an est. 1.11mn for cable. With market share of 51.3%, this would be DSL's first time in the lead.")

<sup>28</sup> *Application of EchoStar Communications Corp., et al.*, Hearing Designation Order, FCC 02-284, CS No. 01-348, Statement of Chairman Powell (rel. Oct. 18, 2002).



According to Goldman Sachs, once approximate parity is reached, the Bells and the cable companies will settle into a 50/50 duopoly, because both sides will “recognize the benefits of a duopoly structure and the negative implications of trying to achieve greater than a 50% share in the context of a duopoly environment.”<sup>29</sup> The lack of pervasive broadband competition denies today’s consumers the benefits of choice, innovation, and lower prices for broadband and other services. For example, the lack of broadband competition permits the Bells to withhold DSL service in order to protect their voice monopoly. As a senior BellSouth representative told an equity market analyst: “Essentially, it’s a huge disincentive for customers to use a CLEC for voice if they are not able to use our DSL service.”<sup>30</sup>

The existence of effective retail competition from cable providers will not negate the RBOCs’ incentives to abuse their power in the broadband marketplace. Duopoly competition is problematic because *both* firms are likely to have the incentive and ability to maintain prices above competitive levels. Rather than attempting to compete with the other, as they would need to do in a market with multiple competitors, firms in a duopoly tend to do the opposite.<sup>31</sup> The ability of DSL providers to exercise market power in the duopoly environment is readily apparent. As AT&T demonstrated in CC Docket 01-337 and WC Docket 02-33, the RBOCs’ ability to retain—and gain—customers, notwithstanding DSL price hikes that were not matched by the cable companies, confirms that the RBOCs exhibit market power even when they face significant cable competition.<sup>32</sup>

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<sup>29</sup> Goldman Sachs, *Telecom Services: Wireline/Broadband* (Apr. 16, 2004) at 7.

<sup>30</sup> Medley Global Advisors, Equity Brief, *BellSouth: DSL/Voice Bundling Faces Regulatory Obstacles* (Jan. 14, 2004) at 3.

<sup>31</sup> See United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Section 2 (rev. Apr. 8, 1997).

<sup>32</sup> See *ex parte* letter of AT&T, CC Docket Nos. 01-337 and 02-33 (February 20, 2004) at 7-8.

**D. VoIP Broadband Applications Will Drive Broadband Facilities Deployment If VoIP Is Not Impeded.**

As the Commission recognized in the *Notice of Inquiry*, the emergence of advanced services that were unheard of only a few years ago makes it clear that “monitoring the progress and deployment of advanced telecommunications platforms and determining if steps can or should be taken to further encourage this growth is one of the Commission’s most important duties.”<sup>33</sup> To avoid the adverse consequences of an entrenched duopoly, the Commission should spur the emergence and growth of broadband applications, such as VoIP, that drive the deployment of advanced services. In addition to serving as a major driver of incremental broadband growth, VoIP holds the potential to “reduce the cost of communication and spur innovation and individualization on a previously unthinkable scale.”<sup>34</sup>

No one disputes that VoIP can bring enormous consumer benefits in the form of innovative new services that are capable of delivering not only high quality voice service but a host of other next-generation features as well. It is clear that VoIP has the *potential* to revolutionize communications and to speed the delivery of advanced services to all Americans. Indeed, VoIP may prove to be the long-sought “killer app” for broadband that will drive the reach and speed of Internet access to unprecedented levels. The breadth and flexibility of existing and future VoIP technologies creates opportunities both for the full range of traditional providers of communications services and for non-traditional providers.

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<sup>33</sup> *Notice of Inquiry*, para. 5.

<sup>34</sup> *Id.* (“For example, companies are developing services and applications making use of Internet Protocol (IP), including Voice Over Internet Protocol (VoIP), which are delivered over broadband connections. This new communications environment could provide each customer with at highly customized, low-cost choice of services delivered in the manner of his or her choosing.”)

It is equally clear, however, that the application of legacy regulations to VoIP services—regulations that in many cases no longer make sense even for the legacy services for which they were designed—poses a grave threat. VoIP in its various forms potentially can help resolve the important policy questions the Commission has raised in the *Notice of Inquiry*, but that potential would be severely undercut by the imposition of the full gamut of common carrier regulation. As Chairman Powell recently stated, “Internet Voice will unleash a torrent of innovative products and services, from many more sources than we are accustomed to, if we let it.”<sup>35</sup>

The deployment of VoIP must not be hindered by the RBOCs’ attempts to tie DSL to their voice services. For example, BellSouth recently sought a declaratory ruling that state commissions may not regulate broadband Internet access services by requiring BellSouth to provide wholesale or retail broadband service.<sup>36</sup> In its petition, BellSouth asked the Commission to preempt state commission orders protecting local competition, and asserted a federally tariffed right to sell DSL service *only* to customers that purchase BellSouth voice service. Under BellSouth’s construction of its tariff, BellSouth could immediately disconnect the DSL service of a customer that decides to purchase VoIP service from a competitive carrier, leaving the customer without voice *or* broadband service. Arrangements such as these violate the Commission’s stated objective of encouraging VoIP deployment and competition, and if left unchallenged will deal a crushing blow to nascent VoIP competition.<sup>37</sup>

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<sup>35</sup> *The Age of Personal Communications-“Power to the People,”* Remarks of Michael Powell, The National Press Club, Washington, DC (January 14, 2004). *See also Atlanta Journal Constitution*, December 25, 2003 (Powell said public policy “should be less about restricting big companies and more about promoting new technologies that others can use to compete against the established players.”)

<sup>36</sup> BellSouth Request for Declaratory Ruling, CC Docket No. 03-251; *ex parte* letter of BellSouth, CC Docket No. 03-251, filed March 1, 2004.

<sup>37</sup> *See ex parte* letter of AT&T, CC Docket No. 03-251, filed April 28, 2004. (“If the Commission were to preempt the state orders at issue here, nothing would prevent BellSouth

**E. BPL Has the Potential to Provide Robust Competition to Cable Modem and DSL.**

In its Notice of Proposed Rulemaking in ET Docket 04-37, the Commission stated that BPL “offers the promise of a new method for delivery of broadband services to residential, institutional and commercial users.”<sup>38</sup> In comments filed in response to the NPRM, AT&T showed that BPL promises to help end the broadband duopoly, and bring the benefits of robust broadband competition to millions of customers.<sup>39</sup> The record established in the BPL Notice of Inquiry<sup>40</sup> demonstrates that BPL is capable of providing data speeds comparable to, or better than, those delivered via DSL or cable modem service.<sup>41</sup> And, as a broadband platform, BPL will, when deployed commercially, provide another means of providing VoIP applications, so that VoIP providers may offer a facilities-based voice alternative to the Bell local exchange monopoly. In addition, as Chairman Powell has observed, BPL holds the potential to cross the

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from disconnecting DSL service when a customer discontinues its BellSouth voice service in favor of a VoIP offering *to be provided over that DSL line*. Granting the petition plainly would impede nascent VoIP competition.”)

<sup>38</sup> *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, Notice of Proposed Rulemaking*, ET Docket No. 04-37, FCC 04-29 (rel. Feb. 23, 2004) (“NPRM”). The Commission has tentatively defined “Access BPL” as a “carrier current system that transmits radio frequency energy by conduction over electric power lines owned, operated or controlled by an electric service provider. The electric power line may be aerial (overhead) or underground.” NPRM, para. 32.

<sup>39</sup> Comments of AT&T, ET Docket No. 04-37, filed May 3, 2004 at 2-3.

<sup>40</sup> *Inquiry Regarding Carrier Current Systems Including Broadband Over Power Line Systems*, 18 FCC Rcd 8498 (Apr. 28, 2003) (“BPL Notice of Inquiry”).

<sup>41</sup> *See, e.g.*, Ambient NOI Comments (data rates to homes of over 3 Mbps); Ameren NOI Comments (symmetrical transmission rates competitive with other broadband services); Ameripion NOI Comments (data transmission speeds of 4-5 Mbps to customers using WiFi); Main.net NOI Comments (sustainable service levels of 1.5-10 Mbps); PowerWAN NOI Comments (greater than 1 Mbps of data speed per user is typically supported); Southern Companies NOI Comments (transmission rates range from 250-500 kbps to speeds that are twice as fast as current generation of cable modems).

“digital divide” by delivering the high-speed Internet to every customer who has electricity.<sup>42</sup>

For all of these reasons, the Commission should encourage and support the rapid deployment of BPL.

**F. WiFi Has the Potential to Provide Robust Competition to DSL and Cable Modem as Well.**

In the *Notice of Inquiry*, the Commission requested comment on the deployment of WiFi technologies and the implications of these technologies for consumers and broadband deployment in general.<sup>43</sup> WiFi services include unlicensed wireless devices operating in specified regions of the wireless spectrum.<sup>44</sup>

As the Commission stated in ET Docket 02-80, “there could be significant benefits to the economy, businesses and the general public in making additional spectrum available for unlicensed transmitters.”<sup>45</sup> AT&T believes that the Commission should continue its efforts to develop alternative means of accessing customers for broadband services, and supports the Commission’s proposed opening of spectrum for use by unlicensed devices. AT&T further believes that authorizing the use of additional spectrum for unlicensed transmitters will lead to increased innovation, more choices, and greater benefits to consumers.<sup>46</sup> WiFi holds particular

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<sup>42</sup> See, e.g. Teri Rucker, *National Journal’s Technology Daily*, *FCC Chairman Sees Digital Services Just Around Corner*, (Jan. 14, 2004) (“Ensuring widespread deployment of broadband over power lines could also solve concerns about a ‘digital divide’ by delivering the high-speed Internet to everyone who has electricity.”)

<sup>43</sup> *Notice of Inquiry*, paras. 24-25.

<sup>44</sup> *Id.* para. 25 and fn. 30. The term “WiFi”, short for “Wireless-Fidelity”, originally applied to unlicensed wireless devices operating in the 2.4 GHz region of the spectrum in accordance with the Institute of Electrical and Electronics Engineers (IEEE) 802.11(b) standard. More recently, the term has also been applied to unlicensed wireless devices operating in the 5 GHz region in accordance with IEEE 802.11(a).

<sup>45</sup> *Additional Spectrum For Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, *Notice of Inquiry*, 17 FCC Rcd 25,632 (rel. December 20, 2002) para. 7.

<sup>46</sup> See Comments of AT&T, ET Docket No. 02-380, filed April 17, 2003 at 1-2.

promise for rural subscribers, insofar as it can provide a viable alternative for segments of rural communities that have not been reached by other carriers.<sup>47</sup>

## **II. THE COMMISSION MUST RECOGNIZE THAT BROADBAND DEPLOYMENT IS A DEMAND ISSUE.**

In CC Docket 98-146, AT&T demonstrated that the Commission should not evaluate the deployment of advanced telecommunications capability based upon static measures of subscribership, such as homes passed or customers.<sup>48</sup> Like AT&T, Sprint stressed that the Commission's primary focus should be on the availability of advanced telecommunications capability, not levels of subscribership, because subscribership is more indicative of demand than supply.<sup>49</sup> SBC and the other RBOCs have experienced and benefited from ongoing and accelerating growth in deployment of cable and DSL services.

While the rate of growth of subscribership may have slowed at some points after the Commission's last report, that result is not unexpected, for several reasons having little if anything to do with Commission policy. Any such momentary slowing of demand experienced by these companies more likely reflects a shift in consumer spending priorities reflecting the

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<sup>47</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Report*, 17 FCC Rcd 2844 (rel. Feb. 6, 2002), para. 115 and fn. 286 citing Comments of Grange at 6 (New technologies such as wireless fidelity "offer promising opportunities to reach some rural communities, especially when they are combined with existing cable, DSL or fiber optic networks.")

<sup>48</sup> Comments of AT&T, filed September 24, 2001, pp. 13-14. In the *Second Report* (at paras. 203-04), the Commission determined that the deployment of advanced telecommunications to all Americans was reasonable and timely in part because it found there had been a "substantial increase in residential customers of advanced services" since it issued its previous report.) *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Second Report*, 15 FCC Rcd 20,913 (rel. August 21, 2000) ("*Second Report*")

<sup>49</sup> Comments of Sprint Corporation ("*Sprint*") at 3-4.

depressed state of the economy rather than a lack of advanced telecommunications capacity or capability. Moreover, the data for the second half of last year and the first quarter of 2004 show that there has been a significant “up tick” in demand for high-speed data services, especially for DSL.<sup>50</sup> In short, there is no need to grant the Bells further deregulation to serve a deployment issue that does not exist.

### **III. FURTHER REGULATORY RELIEF IS UNNECESSARY IN LIGHT OF THE TRIENNIAL REVIEW ORDER.**

In 2001, in comments filed in CC Docket 98-146, the ILECs and others made the vastly inflated claim that without clarification of the ILECs’ unbundling obligations, deployment of advanced services would slow or cease.<sup>51</sup> The parties further argued that the Commission’s delay in ruling on unbundling issues had forced a delay in the deployment of advanced facilities. These arguments were flatly contradicted by the ILECs’ own representations to the financial community. BellSouth’s Duane Ackerman, for example, acknowledged that the regulatory challenges BellSouth is facing “are unlikely to slow down the momentum of the marketplace.”<sup>52</sup>

In the *Triennial Review Order*, the ILECs obtained sweeping relief from unbundling requirements for broadband facilities under Section 251 of the Act. These are the precise obligations that the ILECs had identified as both uncertain and critical to broadband deployment.<sup>53</sup> As AT&T and others have demonstrated in their oppositions to the RBOCs’

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<sup>50</sup> See Merrill Lynch, “US Wireline Services” (May 7, 2004) at 5.

<sup>51</sup> See Comments of Alcatel USA, Inc. at 9-14; Comments of Intel Corporation at 13-15.

<sup>52</sup> Duane Ackerman, *Talk Notes*, Salomon Smith Barney Conference (Jan. 9, 2001) at 11.

<sup>53</sup> See *ex parte* letter of Verizon, CC Docket Nos. 01-337 and 02-33, dated January 7, 2004, in which Verizon seeks clarification of alleged ambiguities in the *Triennial Review Order* that are “most critical” to “near term, deployment” of “next generation broadband networks.”

reconsideration and forbearance petitions<sup>54</sup> the ILECs' claims that the rate of deployment of DSL service has stalled due to ambiguities regarding whether ILECs will have to unbundle advanced services equipment have been fully resolved by the *Triennial Review Order*.<sup>55</sup>

The RBOCs are now asking the Commission in the guise of requests for clarification of the *Triennial Review Order* to adopt new rules that are foreclosed by the plain text and the pro-competitive purposes of the Act. It is clear that granting the RBOCs additional regulatory relief will only serve to *reduce* overall deployment of advanced facilities, by foreclosing the entry of new competitors into the marketplace. By hampering new broadband applications and eliminating new or potential broadband entrants, further deregulation would threaten, rather than promote, competitive broadband deployment.

#### **IV. THE COMMISSION SHOULD REMOVE BARRIERS TO DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES IMPOSED BY LOCAL GOVERNMENTS.**

In the *Third Report*, the Commission expressed concern about the difficulty faced by companies in securing access to the rights-of-way needed to deploy advanced telecommunications infrastructure in a timely manner.<sup>56</sup>

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<sup>54</sup> These arguments have been fully addressed in pleadings filed in the *Triennial Review* proceedings and other dockets. See, e.g. Opposition of AT&T Corp. to BellSouth Petition for Reconsideration, CC Docket No. 01-338 (filed November 6, 2003); Reply Comments of AT&T Corp. to Petitions for Reconsideration, CC Docket No. 01-338 (filed November 17, 2003); Opposition of AT&T Corp. to Petition for Forbearance of the Verizon Telephone Companies, CC Docket No. 01-338 (filed November 17, 2003); Comments of AT&T Corp. on Petition of BellSouth Communications For Forbearance, CC Docket No. 03-220 (filed November 10, 2003); Reply Comments of AT&T Corp., CC Docket No. 03-220 (filed November 25, 2003).

<sup>55</sup> See Comments of BellSouth, CC Docket 98-146, filed September 2001, at 10-13; Comments of Alcatel at 11-14; Comments of Intel at 12-14; Comments of SBC at 11-14.

<sup>56</sup> *Third Report*, 17 FCC Rcd at 2906-07, para. 166. The Commission announced that it intended to explore solutions through a dialogue with industry and state and local commissions in order to remove barriers that may hinder investment in infrastructure.



The same difficulties exist today. Local and state governments continue to use their monopoly control over public rights-of-way to extract unreasonable concessions from companies seeking to deploy broadband facilities or services. This unchecked proliferation of impermissible local telecommunications ordinances and unfair and unreasonable franchise fees and taxes has created a substantial barrier to the entry of advanced communications services, by denying providers access to vital rights-of-way.

AT&T has experience with municipalities that abuse their monopoly power over rights-of-way by requiring AT&T to agree to onerous terms and conditions as a prerequisite to providing service, and delaying deployment if AT&T does not acquiesce. AT&T spent almost eight years negotiating with the City of White Plains, New York, for permission to deploy telecommunications facilities in White Plains. When the city refused to agree to reasonable rights-of-way regulation consistent with the limits in the 1996 Act, AT&T, through its Teleport Communications Group Inc. (“TCG”) subsidiary, was forced to seek relief in federal court.<sup>57</sup> While AT&T and TCG were ultimately successful through litigation in obtaining access to the public rights-of-way in White Plains, more than ten years passed from the time AT&T first sought permission to use the public rights-of-way until it could provide telecommunications services to residents and businesses there.

In another example, the Town of Colonie, NY sought to impose terms and conditions inconsistent with the 1996 Act, including fees that the town did not impose on the incumbent LEC, and conditions of entry that did not relate to the Town’s limited administrative functions. AT&T requested an interim agreement pending resolution of the White Plains litigation, which the Town denied. IN 1999, AT&T was thus forced to sue the Town through TCG. After AT&T

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<sup>57/</sup> See *TCG New York, Inc. v. City of White Plains, New York*, 99 Civ. 4419 (S.D.N.Y. 2000), *aff’d*, *TCG New York, Inc. et al. v. White Plains*, 305 F.3d 67 (2002).

prevailed in White Plains, Colonie still did not conform their actions to the White Plains decision, and AT&T ultimately prevailed on the merits against Colonie as well.<sup>58</sup> This process took approximately four years.

While many localities recognize the benefits of competition and broadband deployment, others view new providers as a means of generating monopoly rents for use of their rights-of-way. In these municipalities, service providers must either agree to the municipality's unreasonable terms or be denied authorization and engage in protracted negotiation or litigation to obtain reasonable terms. The Commission must address this barrier to the deployment of broadband infrastructure by supporting efforts of advanced services providers to obtain access to public rights-of-way, including adopting streamlined procedures for processing section 253 complaints, filing amicus briefs or otherwise participating in litigation regarding the scope of municipal authority under section 253,<sup>59</sup> and identifying the issue in its report to Congress.

## CONCLUSION

The advanced services marketplace has experienced fundamental change since the Commission issued its *Third Notice of Inquiry* in these proceedings. As once-significant competitors like satellite, fixed wireless and public utilities have fallen behind, DSL has approached and attained parity with cable modem services. Today's broadband marketplace is at best a duopoly of cable modem service and ILEC-provided DSL service. The lack of a multi-provider broadband marketplace has had, and will continue to have, a harmful effect on residential and small business customers. The lack of significant competition with the broadband

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<sup>58</sup> See *TC Systems, Inc. and Teleport Communications New York v. Town of Colonie, New York*, 263 F. Supp. 471 (N.D.N.Y. 2003).

<sup>59</sup> In this regard, AT&T believes that the Commission's *amicus* brief filed in the Second Circuit appeal of the *White Plains* decision was extremely helpful to the court in interpreting and applying Section 253.

duopoly denies today's consumers the benefits of choice, innovation, and lower prices for broadband and other services. In the current environment, the Commission must aim to spur the development of new advanced services applications, such as VoIP, as well as alternative broadband technologies, such as BPL and WiFi. The Commission must also continue to oppose the imposition of significant barriers to broadband deployment by municipalities that deny access to the necessary rights-of-way. Measures designed to remove such obstacles and spur the growth of broadband offerings will accelerate the development of advanced telecommunications capabilities, and will encourage and ensure the deployment of competitive broadband services in the future.

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May 10, 2004